No. 378.

Brief of Pinney for D. C.

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BRIEF OF DEFENDANTS IN ERROR.

Filed Feb. 23, 1901.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

NO. 378.

MORTIMER WEBSTER, *Plaintiff in Error.*

vs.

THE CITY OF FARGO; JAMES M. ROWE AS AUDITOR OF THE CITY OF FARGO; D. C. ROSS AS COUNTY TREASURER OF CASS COUNTY, AND O. J. OLSON AS COUNTY AUDITOR OF CASS COUNTY, *Defendants in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

S. B. PINNEY,
JOHN E. GREENE,
H. F. MILLER,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

NO. 378.

Mortimer Webster, Plaintiff in Error,

vs.

The City of Fargo; James M. Rowe as Auditor of the City of Fargo; D. C. Ross as County Treasurer of Cass County, and O. J. Olson as County Auditor of Cass County, Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

As supplementary to the statement made by counsel for the plaintiff in error, we call attention to the fact that it is not alleged in the complaint herein (Transcript pp. 4-8) that the property of the plaintiff was not benefited by the improvement to the full extent of the assessment; nor does it appear that either the plaintiff or any of the owners of property assessed for the improvement ever protested or made objection to either the improvement or the assessment.

ARGUMENT.

The principle underlying the right to make special assessments to cover the whole or a part of the cost of a local improvement, is, we believe, sufficiently understood to permit us to pass at once to the point in this case, without reviewing the history of legislation and adjudication which has brought the law on that subject up to its present state.

All taxation is the taking up of private property for public purposes, and is based upon the theory that the citizen derives a benefit from it, as much as upon the public necessity for it. Special taxation, or these local assessments, are based upon the necessity for some local improvement, and the benefit to result therefrom to the property in its immediate vicinity.

Those provisions of the Codes of North Dakota, under which was made the assessment complained of by the plaintiff in error, it is now claimed by him are in violation of the 14th amendment of the federal constitution, for that they authorize the taking of his property without due process of law.

The objectionable sections are 2279 and 2280 of the Revised Codes of 1895. And they are as follows:

Sec. 2279. When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, curb, drain, or otherwise improve any street, alley, avenue, lane or highway, or other public grounds within the city limits or extend or improve any public system of

water-works exclusively owned and operated by the city for which a special assessment is to be levied, as herein provided, the city council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published for four consecutive weeks, at least once a week in the official newspaper of the city, and if a majority of the owners of the property liable to be assessed therefor, shall not within twenty days after the expiration of such publication file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made and to contract therefor, and to levy and collect the assessment as hereinafter provided, and all work done under this section shall be let by contract to the lowest responsible bidder therefor.

Sec. 2280. Whenever any work or improvement mention in the preceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same.

In order to determine whether or not this law is unconstitutional, we must agree upon the rule by which we are to be governed in the investigation. What is "due

process of law?" The definitions of these terms are almost as numerous as the classes of proceedings whereby the rights of persons and property are affected. A very comprehensive definition is given by Judge Cooley in his work on Constitutional Limitations (4th Ed. p. 441) as follows: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

The case of *Wurtz* vs. *Hoagland*, 114 U. S. 606, it was held that the plaintiff in error had not been deprived of his property without due process of law when his property had been assessed for a local improvement under a statute of New Jersey which provided in substance as follows: The Board of Managers of the Geological Survey, on the application of at least five owners of separate lots of land, included in any tract of land subject to overflow from freshets, or which was usually in low, marshy, boggy or wet condition, were authorized to examine the tract, and if they deemed it for the interest of the owners they were to make surveys, and decide upon a system of drainage, and report it to the supreme court of the state; thereupon the court upon reasonable notice published in a newspaper in the county, was directed to appoint three commissioners to superintend and carry out such system of drainage, but

if, at the time fixed for such appointment, it should appear to the court by a written remonstrance by the owners of a majority of such low and wet land, that they were opposed to the drainage at the common expense, then no commissioners should be appointed. The law also provided that, if commissioners were appointed, and made an assessment upon the lands included in such tract, notice should be given of the time and place when and where the court would hear and pass upon any objections made by the persons interested.

In *McMillen* vs. *Anderson*, 95 U. S. 37, it was held that the constitutional provision that no state shall deprive any person of life, liberty or property without due process of law, does not require that persons taxed by the law of the state shall be present or have an opportunity to be present when the tax is assessed against them. And it was further held that a statute which gives the taxpayer a right to enjoin its collection, and have the validity of the tax decided by a court of justice, is due process of law notwithstanding it requires the party to give security in advance as in other injunction cases. We call attention to the very interesting comments upon this subject in *Weimer* vs. *Bunburg*, 30 Mich. 201, 212.

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Before proceeding to analyze the statute in question here in the light of the foregoing citations, it is necessary that we consider another most vital question, viz.:

Has the legislature the power to prescribe the method of apportioning special assessments of the kind involved in this case?

An examination of the authorities forces us to the conclusion that this question must be answered in the affirmative.

In *The Providence Bank* vs. *Billings*, 4 Peters, 514, Chief Justice Marshall makes use of language, at page 563, which is of interest as introductory to this branch of the discussion: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. * * * * However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish a corrective for every abuse of power which may be committed by the state government. The interest, wisdom and justice of the representative body, and its relation to its constituents, furnish the only security * * * * against unwise and excessive taxation, as well as against unwise legislation generally." This language has reference more particularly to general taxation, but it is an eloquent

reminder that the constitution is not intended as a refuge for, and that it will not afford relief to every victim of unwise legislation.

We contend that section 2280 of the North Dakota Codes, which prescribes the method of apportionment in all cases of street improvements in cities within the state, is a result of the proper exercise of legislative discretion upon a matter of policy. Such legislation has been approved by the highest authority.

Bauman vs. Ross, 167 U. S. 548.
Shoemaker vs. United States, 147 U. S. 282.
Sheley vs. Detroit, 45 Mich. 432.
Cleveland vs. Tripp, 13 R. I. 50.
State vs. Fuller, 34 N. J. (law) 227.
2 Dillon Mun. Cor. Sec. 752.
Cooley on Taxation, p. 661. (2nd Ed.)
Cooley Cons. Limitations 631, 632.
Northern Ind. R. R. Co. vs. Connelley, 10 Ohio, (N. S.) 159, 165.

In *Bauman* vs. *Ross*, above cited, this court said: "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

In *Cleveland* vs. *Tripp*, above cited, the chief justice of the Rhode Island court says: "To entitle us to hold that the statute authorizing these assessments is uncon-

stitutional we ought to be satisfied, not only that fairer modes of assessment might be devised, but that the prescribed mode is indefensibly unfair; for in a matter of legislative policy, it will not do for the court to substitute their own judgment for that of the General Assembly and to convict the General Assembly of fatal error, simply because they differ from it in opinion."

Judge Cooley in his work on taxation, as above cited, says: "It is conceded that the legislative judgment, that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment, is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusions is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation."

It will not do to argue, in the face of these authorities, that the apportionment of a special assessment is a judicial act, and in the case at bar, that the legislature of North Dakota has invaded the province of the judiciary.

Article 6 of the constitution of North Dakota provides that "the legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments."

The legislature, by the statute in question, have done

no more than obey the mandate of the constitution. It was clearly within the means of that representative body to ascertain what rule of apportionment of such assessments within the cities of the state, would come nearest to justice and equality, and we must presume that, when they made section 2280 a part of the general charter for all cities, they did so upon full investigation, and with the design to subserve the best interest of those who might be affected by such assessments.

But it is argued that the law utterly ignores the matter of benefits. If the question of benefits is to govern, we have but to turn again to the authorities for the interpretation of these statutory apportionments. When the legislature directs that the cost of the improvement be assessed to the abutting property, by whatever rule, it will be presumed that they have determined that the cost will not exceed the benefits.

Petition of Roberts, 81 N. Y. p. 62.
Northern Indiana R. R. Co. vs. Connelly, *supra*.
Cooley on Taxation (2nd Ed.) p. 646.
State vs. Fuller, supra.
Schenley vs. Commonwealth, 36 Pa. St. 29, 57.

In Cooley on Taxation, as above cited, we find the rule best stated as follows: "Apportioning the cost by the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an ap-

portionment in proportion to benefits as nearly as is reasonably practicable."

See also the dissenting opinion of Mr. Justice Brewer, in *Norwood* vs. *Baker,* 172 U. S. at page 299.

So far we have eminent authority supporting the proposition that, within certain bounds, legislative apportionment of local assessments is, a proper exercise of legislative power; and further, that when the legislature establishes the rule, it is presumed to have determined that the benefits will equal the cost of the improvement.

We shall now inquire into the procedure in the case at bar, to ascertain whether or not such notice has been given as to afford the plaintiff in error a sufficient opportunity to be heard.

On March 4th, 1896, the city council of the City of Fargo, acting under section 2279, passed a resolution declaring it necessary to grade and pave the street opposite the property of the plaintiff in error, which resolution was published in the official newspaper of the city, for the period required by said section. (Transcript p. 5, Paragraph V. of complaint.) On June 22nd, 1896, and 25 days after completion of the publication of the said resolution, said city council, by another resolution, directed the improvement to be made, and directed the city auditor to

advertise for bids. (Id. Paragraph VII. of complaint.) By paragraph XVI. of the complaint, (Trans. p. 8) it is alleged that all acts and proceedings required by the statute in such cases, were taken and done, so this last action of the council pre-supposes that no protest against the improvement were presented, such as contemplated by section 2279. By this first resolution notice was given that, in the absence of the protest by the property owners, the improvement would be made, and if made, that the cost would be apportioned in the manner prescribed by section 2280, of which all persons were bound to take notice. If the majority of the owners of the property to be affected were opposed to the improvement on that basis of assessment or otherwise, they had but to file their protests within the 20 days following the last publication of the resolution—May 28th, 1896; if the protests had been so filed, no further action on the part of the council could be taken. No protests having been filed, the city council on June 22nd passed the second resolution, and the auditor caused to be published an advertisement for bids for the work of so improving said street, which bids were to be filed on or before the 6th day of July, 1896. On the 24th day of June the bid, which was finally accepted, was filed. (Trans. p. 6. Paragraphs VII. to IX. of the complaint.) Thereupon the city engineer of said city proceeded to calculate the amount to be assessed upon each lot or parcel of ground abutting on such improvement, in the maner prescribed by

section 2280, and such estimate of the assessment was duly published with a notice that the council would meet on September 28th, 1896, at 7:30 o'clock p. m., to approve such assessment. (Trans. pp. 6, 7. Paragraph X. of complaint.) On September 28th the council met pursuant to such notice, and by resolution said estimate was approved, and thereupon the auditor duly prepared the formal assessment, which was also duly published. (Trans. p. 7. Par. XI. of complaint.)

By these proceedings, (all within the purview of the charter provisions) the persons interested were given three opportunities to be heard before the assessment became a lien upon their property. First: When the resolution declaring the improvement necessary was published, they were notified that if the work was done it would be apportioned according to the rule fixed by section 2280, and they had from the 7th day of March, 1896, to the 22nd day of June following in which by protest to absolutely annul all proceedings looking to such an assessment. Second: When the council met, pursuant to published notice, on July 6th to consider the bids which, if accepted would determine the cost of the work, they had an opportunity to be heard, and if the probable expense was too great they could then petition their local representatives—the city council—to stop further proceedings. Third: When the council met to approve the engineer's estimate on September 28th, 1896, they had a final opportunity to inspect the proposed assess-

ment and see that they were not disproportionately assessed.

If the legislature has the power to fix the method of apportionment, what more can be asked by way of notice and hearing than has been thus afforded under section 2280? What "safeguards for the protection of individual rights" have been ignored? What "settled maxims of law" in relation to taxation and assessment have been transgressed? If the legislature may fix the mode of apportionment by general law, then notice of the law is sufficient notice on that point, and our procedure is similar to that involved in Wurtz vs. Hoagland, before cited, whereby a majority of the property owners may, by timely protest nullify the whole proceeding. From what has already been shown from the authorities, and the application of the rules set forth, to the statute here involved, and what has been done under it, we conclude that the law is not in violation of the 14th amendment of the federal constitution; and further that the statute is in no way condemned by the decision in *Norwood* vs. *Baker*, 172 U. S. 269.

In *Norwood* vs. *Baker*, above cited, the court had under consideration an ordinance of the Village of Norwood, whereby the village council sought to open a street, ostensibly under authority of the law of the state but in fact without color of law or justice. It will be remembered that

the state legislature had not in that instance fixed upon any one method of apportionment, but it was left to the village authorities to apportion the burden "*either* in proportion to the benefits which may result from the improvement *or* according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance, * * * * may determine." The statute seems to be silent as to the matter of notice of any proceedings. Furthermore the language of the statute is such as to imply that if assessment was levied upon the basis of valuation of the property, or under the "front foot" rule, the matter of benefits was to be excluded. The council evidently so regarded it. The ordinance is remarkable, judging of it from the statement given in the Norwood-Baker case on pages 274 and 275 of the report. It declared the intention of the village to condemn and appropriate the lands in question, and did so condemn and appropriate them; it provided that the cost of the condemnation proceedings together with compensation paid for the land condemned and interest upon bonds, if any, be assessed *per front foot* upon the abounding property. The abounding property was all owned by the person whose property was condemned and appropriated by the village. The assessment was made pursuant to that ordinance. There appears nowhere in the ordinance, nor by any other proceedings had, that any estimate of the cost, or of the proposed assessment was made and filed,

as required by section 2277 of the Revised Statutes of Ohio, or otherwise; or that any time or place was fixed or allowed when or where the person interested should be heard upon the question of the assessment, or apportionment thereof. If there had been embodied in the ordinance a provision like the one contained in section 2279 of the North Dakota Codes, the protest of the appellee, Baker, in that case would have protected her against any such high-handed proceeding. In that case the statute of the state seems, by its terms to license the disregard of the matter of benefits, and the village council seem to have used that license to the utmost, with the result that the property of Baker was practically confiscated.

We submit that the cases are in no sense parallel, and that *Norwood* vs. *Baker* is not opposed to the contention of the defendants in error here.

We most respectfully ask that the judgment of the state court be affirmed.

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